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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. PAVEL LAZARENKO, Defendant.	No. CR 00-0284 MJJ UNITED STATES' SENTENCING MEMORANDUM; RESPONSE TO DEFENDANT'S SENTENCING MEMORANDUM Date: August 18, 2006 Time: 10:00 a.m. Court: Hon. Martin J. Jenkins

I. INTRODUCTION

The United States files this memorandum to provide its position on sentencing and respond to defendant Pavel Lazarenko's sentencing memorandum.

Throughout the 1990s, the defendant – the former Prime Minister of Ukraine – engaged in massive abuse of both his public office and the United States' financial system. As Ukraine emerged as an independent country, the defendant took advantage – through extortion and fraud – to enrich himself and conceal $44,000,000 of ill-gotten gains through a maze of offshore accounts, in violation of both Ukrainian and federal law. As a result, the defendant stands convicted of 14 counts of money laundering, wire fraud, and interstate transportation of stolen

property.

As set forth more fully below, the United States urges the Court to impose a sentence of 220 months in custody, forfeiture of $22,846,000, a fine of $43,392,000, a mandatory special assessment of $1,150, and a three-year term of supervised release. The defendant's conduct was egregious – he misused his office to generate tens of millions for himself at the expense of the Ukrainian people and then sought to avail himself of our banking system to safeguard his criminal proceeds. Further, his ongoing claims of innocence and recent election in Ukraine demonstrate that he continues to pose a danger, and a significant sentence is necessary to satisfy the goals of 18 U.S.C. § 3553(a).

II. GUIDELINE CALCULATION[1]

A. Grouping

The United States agrees with the presentence report (PSR) and believes that, under § 3D of the Sentencing Guidelines, the defendant's convictions fall into two groups: (1) the money laundering offenses, which include the money laundering conspiracy (count one, 18 U.S.C. § 1956(h)) and the substantive money laundering counts (counts two through five, 18 U.S.C. § 1956(a)(2), and six through eight, 18 U.S.C. § 1956(a)(1)(B)); and (2) the wire fraud and ITSP counts (counts twenty-five through twenty-nine and thirty-one, respectively).

Specifically, the money laundering and wire fraud offenses do not group under § 3D1.2(d) pursuant to U.S. v. Taylor, 984 F.2d 298, 303 (9th Cir. 1993), and its progeny. In Taylor, the Court found error based on the grouping of wire fraud and money laundering conduct because "grouping under § 3D1.2(d) is not appropriate when the guidelines measure harm differently" and "the guidelines for wire fraud and money laundering measure harm differently." Id.; see also U.S. v. Syrax, 235 F.3d 422, 424-425 (9th Cir. 2000) (affirming district court's refusal to group money laundering and wire fraud under § 3D1.2(d) based on Taylor); U.S. v. Hanley, 190 F.3d 1017, 1033 (9th Cir. 1999) (same). Consequently, the government believes that the money laundering offenses represent one group and the wire fraud and ITSP offenses, which

[1] At outset, United States notes that it agrees with the defense and United States Probation that the 1997 edition of the Sentencing Guidelines apply pursuant to U.S.S.G. § 1B1.11, and, unless otherwise noted, it uses that edition throughout.

group under § 3D1.2(d), represent another.

In his sentencing memo, the defendant objects to the failure to group all of the offenses on two unavailing grounds. First, the defense claims that we have overlooked U.S. v. Rose, 20 F.3d 367, 372-73 (9th Cir. 1994), which, according to the defense, permits grouping "where there is there is identity between the laundered and fraudulently derived funds." Def. Mem. at 8. However, the defendant's argument ignores both Rose's limited holding and factual differences with this case. As the Ninth Circuit explained in U.S. v. Hanley, 190 F.3d 1017, 1033-1034 (9th Cir. 1999), the Rose Court "held that, because there was a complete identity between the laundered and fraudulently derived funds, the amount of fraudulently derived funds could be treated as 'relevant conduct,' akin to uncharged counts of money laundering, for purposes of calculating the 'value of funds' under § 2S1.1." Here, the funds are not co-extensive – not all of the funds involved in the wire fraud can be recast as uncharged counts of money laundering – and thus Rose is inapplicable. The "complete identity" of Rose is not present here, where the funds underlying the money laundering are not identical to the funds underlying the wire fraud. Moreover, the holding in Rose is limited – the Ninth Circuit affirmed the district court's offense level not on grouping grounds, but rather, as set forth above, as relevant conduct. Hanley, 190 F.3d at 1033-1034. Thus, Rose does not speak to grouping on the facts of this case. To the extent the defense suggests otherwise, they are wrong – Taylor controls and grouping is unavailable.

Second, the defendant claims that grouping is appropriate based on the 2001 amendment (Amendment 634) to the money laundering guidelines, which included a new application note (Note 6) that provides for grouping pursuant to § 3D1.2(c), "[i]n a case in which the defendant is convicted of a count of laundering funds and a count for the underlying offense from which the laundered funds were derived." See § 2S1.1., App. N. 6, U.S.S.G. (November 1, 2001, ed.); Def. Mem. at 9. To support this argument, the defendant erroneously suggests that, under § 1B1.11, this new note is "clearly a 'clarifying' change" and thus must be considered. Def. Mem. at 9. However, the defendant's argument has been rejected by six Circuits that have considered it. See U.S. v. Sabbeth, 277 F.3d 94, 96-99 (2nd Cir. 2002) ("[w]e conclude, based on the

comprehensive nature and extent of the Sentencing Commission's changes, that the introduction of Application Note 6 is clearly substantive"); U.S. v. Edwards, 309 F.3d 110, 112-113 (3rd Cir. 2002) (agreeing with sister Circuits "that Amendment 634 is a substantive amendment"); U.S. v. McIntosh, 280 F.3d 479, 485 (5th Cir. 2002) (same); U.S. v. King, 280 F.3d 886, 891 (8th Cir. 2002) (same); U.S. v. Aptt, 354 F.3d 1269, 1276 (10th Cir. 2004) (same); U.S. v. Descent, 292 F.3d 703, 708-709 (11th Cir. 2002) (same).

As the Second Circuit explained, the defendant there, as here, mistakenly focused on the Application Note without:

> recogniz[ing] the significance of the fact that the amended version of Section 2S1.1 redefines the way in which the offense level associated with the crime of money laundering is calculated, so that the offense level for money-laundering may now be dependent upon the offense level assigned to the underlying offense.

Sabbeth, 277 F.3d at 97. As Sabbeth Court discussed, Amendment 634 "thoroughly revised" the money laundering guidelines, by consolidating two separate instructions, § 2S1.1 and § 2S1.2, and changing the way the offense level for money laundering is calculated. See Sabbeth, 277 F.3d at 99 ("stark contrast" between former 2S1.1, which set base offense level at 20 or 23 without reference to underlying offense, and revised § 2S1.1, which factored underlying offense into base offense calculation). Further, as the Sentencing Commission explained, the purpose in completely revising § 2S1.1 was "to promote proportionality by providing increased penalties for defendants who launder funds derived from more serious criminal conduct, such as . . . fraud offenses that generate relatively high loss amounts, and decreased penalties for defendants who launder from less serious underlying criminal conduct." U.S.S.G. App. C, Vol. II, Amend. 634, p. 227. Given the substantive nature of these changes, and the uniform rejection of the defendant's position by the Circuit courts, the Court should reject it as well.[2]

B. Money Laundering Group (Group One)

As discussed more fully in this section, the United States concurs with the PSR's calculations of the Guidelines applicable to this group as follows, except that the United States is

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[2] In a now withdrawn opinion, a Ninth Circuit panel had ruled that the amendment was a clarifying change. See U.S. v. Butler, 389 F.3d 956 (9th Cir. 2004), withdrawn by, 406 F.3d 1173 (9th Cir. 2005).

no longer seeking an adjustment for abuse of trust under § 3B1.3:

Base Offense Level		
§ 2S1.1(a)(2) (base offense)	=	20
Specific Offense Characteristics		
§ 2S1.1(b)(2)(K) (value of funds)	=	10
Adjustments		
§ 3B1.1(a) (aggravating role: organizer/leader)	=	4
		34

1. Base Offense/Specific Offense Characteristics

The parties agree that the base offense level is 20, but disagree as to the appropriate increase based on the value of the laundered funds. Here, where the defendant was convicted of laundering $21,696,000, the Guidelines provide for a 10-level increase because the value of the funds exceeds $20,000,000 under § 2S1.1(b)(2)(K). The United States asserts that that 10-level increase is the proper Guideline calculation.

The defense rejects a straight-forward application of that guideline. Instead, the defense relies on another new application note contained with the November 1, 2001 revisions to § 2S1.1 to argue for a lesser increase. Specifically, the defendant claims that Application Note 3, which addresses the treatment of commingled funds under a new base offense provision (§ 2S1.1(a)(2)), supports his position.

The defendant's argument is wholly unavailing. First, in light of the wholesale changes embodied by the November 1, 2001 revisions to § 2S1.1., and the Circuit Courts' treatment of those changes as substantive (not clarifying), as set forth above, it is unclear whether this commingling Note may properly be considered by the Court. However, the Court need not reach that issue because here, far from aiding the defendant's claim, the cited Note conclusively dispenses with it. While the Note addresses the situation of commingled funds, it places the burden on the defendant to distinguish "criminally derived funds" from legitimate funds and to establish the value of the criminal funds by providing "sufficient information to determine the amount of criminally derived funds without unduly complicating or prolonging the sentencing process." U.S.S.G. § 2S1.1, App. N.3 (2001 ed.).

Here, the defendant does not, and cannot, present such evidence. The very nature of the

defendant's crime was to transfer and commingle money from so many difference sources that it would be virtually impossible to discern the nature and source of the funds. The defendant cannot now benefit from his criminality to avoid punishment, and the Note makes this clear. "If the amount of the criminally derived funds is difficult or impracticable to determine, the value of the laundered funds . . . is the total amount of the commingled funds." Id. Thus, because the defendant has not met his burden, the value of the funds for sentencing purposes is $21,696,000, the total amount of the commingled funds contained in the counts of conviction for money laundering.

In an effort to circumvent the plain language of this Note, the defendant concocts an analysis predicated on the Court's dismissal of certain portions of the case to argue that he is only responsible for approximately 11% of the value of the funds. Defendant starts out by arguing that because the Indictment referenced $237 million and the government only proved, at most $44 million, or less than 20%, "there is no reasonable or fair basis for attributing a higher proportion of illegal to funds to any U.S. transaction." Def. Mem. at 11. Thereafter, the defendant seeks to reduce his responsibility to roughly 11% by excluding a portion of the Nauvoky funds and reducing the amount of the Kiritchenko extortion. Id. at 11-12.[3] This argument is completely unavailing. The Note requires more than defense counsel's creative

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[3] The defendant takes his figures from the amounts discussed in the wire fraud section of the Indictment (see Indictment ¶ 35), and excludes $6 million related to the Naukovy fraud because, according to the defendant, that money went to Guernsey. Of course, the defendant utterly fails to explain why the movement of that $6 million to Guernsey, a further displacement designed to avoid detection, is not appropriately considered as part of the scheme to defraud upon which the defendant was convicted, and thus appropriate for sentencing consideration. Of course, more fundamentally, the defendant fails to provide authority to explain how and why the Court's dismissal of other counts (based primarily on the Court's view that the government failed to prove up violations of Ukrainian law) should reduce the defendant's sentence on the counts of conviction. Further, the defendant seeks to evade responsibility for the entirety of the $30 million he extorted from Kiritchenko by misreading Kiritchenko's request for restitution of $17,363,309. Nowhere in his request does Kirichenko state that he only paid Lazarenko $17,363,309; rather, Kirichenko simply focuses on a subset of funds that he believes are appropriate to seek in restitution. Again, the inability to discretely trace all $30 million is a function of the extensive efforts the defendant engaged in to conceal his illicit wealth and, in accordance with the Note, the defendant should not be rewarded for that concealment with a lesser sentence because of it.

thinking – it requires the defendant to provide "sufficient information" to distinguish legitimate from illegitimate funds "without unduly complicating or prolonging the sentencing process." § 2S1.1, App. N.3. Where, as here, it is "difficult or impracticable" to for the defendant to make that distinction, the value of the commingled funds controls. This is particularly appropriate here where the defendant's own wrongdoing makes it virtually impossible to distinguish the funds. Further, the defendant's analysis mixes apples with oranges – the money laundering conspiracy has always involved the $21,696,000 alleged in the indictment and proven at trial. The reference in the indictment to $237,000,000 as part of the wire fraud scheme (¶ 35) is wholly distinct and thus not a proper basis for the defendant's analysis. The defendant's spin is not a factual analysis of the source of the funds based on the evidence and therefore is inadequate under the Note. This is especially true here where the defendant provides no legal authority to support his argument. Accordingly, the Court should reject it.

2. Role Adjustment

The defendant qualifies for an aggravating role adjustment because he was "an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." §3B1.1(a). The application notes provide that "a 'participant' is a person who is criminally responsible for the commission of the offense, but need not have been convicted." App. N. 1. Further, the notes explain that "in assessing whether an organization is 'otherwise extensive,' all persons involved during the course of the entire offense are considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive." App. N. 3 (emphasis added). This enhancement is designed to account for the role the defendant played in committing the offense, and that determination is made "not solely on the basis of elements and acts cited in the count of conviction" but on all relevant conduct under § 1B1.3. See § 3B1.1, Introductory Commentary. In other words, an assessment of the defendant's role requires a broad view, and should not be limited to facts related to a specific count of conviction.

Here, the defendant independently qualifies for this adjustment both based on his role in the underlying conduct giving rise to the money laundering conspiracy, e.g., the acts of

extortion, wire fraud and interstate transportation of stolen property that undergird the money laundering, and for his role in the money laundering offenses themselves. It is entirely proper to consider the defendant's role in the underlying criminal activity to determine the applicability of this role adjustment in relation to his money laundering. See U.S. v. Hanley, 190 F.3d 1017, 1034 (9th Cir. 1999) (citing U.S. v. Savage, 67 F.3d 1435, 1443-44 (9th Cir. 1995), for its holding that the defendant's "role in the entire mail and wire fraud scheme is relevant conduct for purposes of determining his aggravating role in money laundering"). This is particularly appropriate here where the money laundering conspiracy itself details the defendant's acts of extortion and fraud, along with the defendant's efforts to conceal his receipt of illicit funds through the use of various bank accounts outside of Ukraine and, ultimately, through the acquisition of an offshore bank, Eurofed. See, e.g., Indictment, ¶¶ 19 (Kiritchenko extortion), 20 (Naukovy fraud)), 25 (bank transfers). Moreover, the defendant's underlying criminal activity – through fraud and extortion – was part of a broader course of conduct, embodied in the money laundering conspiracy, designed to ensure that he procured and safeguarded the illicit funds he obtained through the abuse of his authority.

The defendant qualifies for a leadership adjustment based on his role in the underlying conduct under both prongs of § 3B1.1(a), five or more participants and otherwise extensive. First, although only the defendant and Kirichenko have suffered convictions, there were at least three other participants involved in defrauding Naukovy: (1) Naukovy's director (Mykola Agofonov); (2) the director's son (Vadim Agofonov); (3) the owner/director of the Dutch firm Van Der Ploeg en Terpstra (Rientz Van Der Ploeg). As the Court is aware, Mykola Agofonov played a critical role by arranging for Naukovy's use of Van Der Ploeg's business bank account and directing the disbursement of Naukvoy's funds from it, by directing disbursements to the defendant, and by signing fraudulent cattle contracts with Van Der Ploeg to conceal the siphoning of funds. Similarly, Van Der Ploeg played an important role by providing access to his account, signing the fraudulent contracts with Agofonov, and arranging for Katsabanis to document a non-existent sale in a further attempt to avoid detection of the Naukovy fraud. Likewise, Agofonov's son both facilitated the scheme's concealment (by having Van Der

Ploeg's accountant manufacture phony records) and benefitted from it (because funds were diverted to pay for his tuition abroad).

Based on the Naukovy scheme alone, the defendant qualifies for this adjustment because it was "otherwise extensive." In addition to the five participants, numerous other individuals, including six identified herein, were involved, even if unwittingly. For example, the entire fraud was predicated on Naukovy's ability to export valuable Ukrainian commodities for sale in the West, which, in turn, required the defendant's issuance of a governmental decree, Directive 100. The export process required the issuance of licenses and quotas, which were provided by officials, such as Vitaliy Zhmurenko and Viacheslav Antonov, who worked under the defendant. Further, the Naukovy fraud also involved the misappropriation of funds from another state entity under the defendant's influence, the Nikipol Ferroalloy plant. That part of the fraud involved, among others, the defendant's deputy, Eduard Dubinin and Nikipol's director, Borys Velychko. There were others that played roles unwittingly, such as the book-keepers for Naukovy (Ludmilla Halliulina) and Van Der Ploeg (Theodore Velseboer).

Although it is most appropriate to consider the defendant's money laundering activities together with his conduct in the underlying crimes in evaluating application of this role adjustment, the United States notes that his money laundering activities alone provide a basis for this adjustment as "otherwise extensive." Specifically, the defendant was the leader of extensive criminal activity related to his money laundering – he controlled and directed Kiritchenko to open accounts and transfer funds through offshore banks to conceal his ill-gotten gains, often involving numerous transfers to make it more difficult to track the funds; he owned and controlled Eurofed, by, among other things, approving the investment of the bank's funds (the vast majority of which were his); he controlled numerous bankers, in Switzerland and elsewhere, who oversaw his accounts (which were also coded and/or in the names of sham companies) and, at his direction, closed accounts and, for example, issued bearer checks (in a failed attempt to conceal the source of the funds);[4] and, he also obtained a Panamanian travel document and made

[4] Additionally, a brief review of the defendant's banking relationships reinforces this point – over the course of the 8½ years of the money laundering conspiracy, the defendant

Kirtichenko an advisor to facilitate and further conceal this activity. Additionally, the defendant laundered funds through a sham company, Dugsbury, and related bank accounts, to acquire his residence at 100 Obertz Lane and conceal his interest in it. There again, the defendant's money laundering implicated the participation, even unwittingly, of others, including Michael Menko (Dugsbury's director) and Nancy Allen (the real estate agent). Thus, the defendant's money laundering scheme alone involved another seven witnesses (Ruegg, Metz, Walkovitz, Krug, Allen, Menko and Liverant) who testified at trial. Moreover, this list is necessarily under-inclusive. For example, it fails to account for: bank employees (other than those who testified) involved in setting up and maintaining Lazarenko's accounts at banks all over the world; the individuals that assisted Lazarenko in obtaining the Panamanian travel documents that allowed him to travel outside Ukraine without obtaining visas; and all of the Ukrainian officials involved in implementing Directive 100 or ensuring the necessary quotas and licenses were issued.

To evade application of this adjustment, the defendant offers several unconvincing arguments. First, the defendant attempts to recast the money laundering offenses as only involving the discrete transfers into or out of the United States that were contained in the substantive counts and thus not "otherwise extensive." Def. Mem. at 14. At the outset, it is worth noting that this analysis fails for at least two reasons. First, it entirely overlooks the nature of the money laundering conspiracy alleged in the Indictment and proven at trial, which, as set forth above, is "otherwise extensive" within the meaning of the § 3B1.1.[5] Second, it ignores §

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worked with, and, in some instances, lied to, numerous bankers to open accounts around the world in order to conceal the receipt and movement of these funds. Some testified at trial or through their depositions (Metz, Ruegg, Walkovitz, and Krug).

[5] For example, the defense suggests that the acquisition of Eurofed cannot provide the basis for a finding that the activity was "otherwise extensive" because Kiritchenko initiated the process to acquire the bank and he indicated he did so for business purposes. The defense then speculates that the acquisition was to handle the energy sector funds and not to launder the proceeds of the defendant's criminal conduct. This argument turns a blind eye to the evidence adduced at trial and necessarily credited by the jury. At the time Kiritchenko initiated the process to acquire Eurofed, the defendant had been expressing his concerns that he would be dismissed as Prime Minister and his Swiss assets would be frozen. Further, Kiritchenko did not proceed until he obtained approval from the defendant. More fundamentally, the defendant was concerned with the discovery of any of his assets (irrespective of the source), and, in that regard,

3B1.1's instruction to look beyond the defendant's conduct contained in the counts of conviction to relevant conduct under § 1B1.3(a)(1)-(4). § 3B1.1, Introductory Comm.[6]

The defendant offers several deficient arguments as to why the Court need not consider relevant conduct. First, the defense relies on yet another application note to the substantive revisions of § 2S1.1, effective November 1, 2001. Specifically, Note 2(C), which relates to the determination of the base offense level for money laundering by reference to the offense level for the underlying offense, provides that "application of any Chapter Three adjustment shall be determined based on the offense covered by this guideline . . . and not on the underlying offense." § 2S1.1., App. N.2(C), 2001 ed. As discussed more fully above, and for the reasons articulated in Sabbeth, this change is substantive (not clarifying) in nature and thus affords the defendant no relief. Second, the defendant claims the underlying offenses and the money laundering conspiracy are not "inherently intertwined" and thus cases like Hanley and Savage have no application. Wrong. Even assuming the cases required such an interrelationship, it clearly exists here where the defendant's money laundering furthered his overarching objective of obtaining and concealing his illegitimate wealth, and thus the adjustment applies.[7]

Finally, the defendant argues there is no evidence that he (as opposed to Agofonov) was

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he filed false declarations of income for 1996 and 1997 to conceal them.

[6] The defendant also argues that if the "criminal activity" appears "otherwise extensive" because of its connection to large transactions involving legally derived funds, it cannot be held against the defendant. That analysis also turns the crime of money laundering on its head. Commingling legal and illegal funds is a hallmark of money laundering activity, and it is entirely appropriate to adjust the defendant's sentence based on that type of concealment. Further, the Fifth Circuit case cited by the defense, U.S. v. Powell, 124 F.3d 655, 663-666 (5th Cir. 1997), has no direct application to the facts of this case.

[7] Further, to the extent the defendant contends that the money laundering offenses were merely an afterthought to the underlying criminal conduct, he is wrong again. The offenses took place contemporaneously. For example, in June of 1993, the defendant's LIP Handel account received $1,205,000 from Naukovy, and thereafter $1,800,000 was transferred from that account to Kirtchenko's ABS account (ITSP conviction – count 31) on July 1, 1994, and, within a few months, Kirtichenko transferred funds from that ABS account to the defendant's CARPO-53 account, each of which constituted a money laundering count: $1,510,000 on July 11, 1994 (count 2), $968,000 on August 18, 1994 (count 3), and $1,963,000 on December 12, 1994 (count 4).

the organizer/leader of the Naukovy fraud. Nonsense. The record is replete with references to Lazarenko's leadership role, including his control of the Dnepropetrovsk region. Moreover, Directive 100, a governmental directive he signed, was a necessary predicate for the Naukovy scheme to work – without it, no exports could be sold and no proceeds skimmed. See also, Order Granting in Part and Denying in Part Rule 29 Motion (May 20, 2005) (hereinafter Rule 29 Order), at 3 ("[t]here is an abundance of evidence in the record regarding Defendant's extensive influence and control over Dnepropetrovsk generally and Naukovy Farms specifically during the relevant time period").

Based on the foregoing, the Court should apply a four-level adjustment for the defendant's leadership role.[8]

C. Wire Fraud/ITSP Group (Group Two)

The United States agrees with the PSR that the wire fraud and ITSP counts group and that the Guidelines apply as follows:

Base Offense Level		
§ 2C1.7(a) (base offense)	=	10
Specific Offense Characteristic		
§ 2C1.7(b)(1)(A) (value obtained by public official) (incorporating table from § 2F1.1)	=	17
Adjustments		
§ 3B1.1(a) (aggravating role: organizer/leader)	=	4
		31

Under the 1997 Guidelines, wire fraud is subject to two guidelines sections, § 2C1.7 (Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials) or § 2F1.1 (Fraud and Deceit). According to Appendix A, in that situation, the parties should "use the guideline most appropriate for the nature of the offense conduct charged in the count of which the defendant was convicted." See Appendix A – Statutory Index, Introduction. Here, that guideline is § 2C1.7 – the defendant, a public official, was convicted of honest services wire fraud. Moreover, the government was required to prove Ukrainian law violations, including

[8] In the event the Court finds that the defendant does not merit a four-level increase, the United States requests that it impose a lesser increase of two or three levels under § 3B1.1(b) or (c).

Ukrainian Code sections 86 (theft of state property) and 165 (abuse of authority), to establish wire fraud. Accordingly, § 2C1.7 is the most appropriate guideline.[9]

The specific offense characteristic refers to the table in § 2F1.1 for the "the value of anything obtained by a public official." Because the defendant obtained $44 million (from the extortion of Kiritchenko and the defrauding of Naukovy), the increase is 17 levels under § 2F1.1(b)(1)(R), more than $40 million.

Further, the adjustment for organizer/leader is applicable for the reasons set forth above.

In an attempt to decrease his exposure under these guidelines, the defendant argues that any increase attributable to the funds he received be decreased from 17 to 14 based on Kiritchenko's restitution request ($17,363,309) and the defendant's notion of proportionality (that the loss figure reflect a discount based on the dismissed conduct). As previously discussed, these grounds are inadequate. First, Kiritchenko's restitution claim cannot, and does not, impact his trial testimony that he made $30 million of extortion payments to the defendant, and thus fails to provide a basis for the decrease. Similarly, the defendant's claim – that he is only responsible for less than 20% of the criminal proceeds generated by his conduct because the Court dismissed other, distinct conduct from the case – is without legal authority and makes no logical sense. The defendant fails to explain why the dismissed conduct should reduce his exposure of the counts of conviction.

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[9] To the extent the defendant claims that this section cannot apply because the defendant is not a U.S. public official, the defendant is wrong. First, although the guideline application note provides that the term "'public official' . . . includes officers and employees of federal, state, or local government," it does not preclude application to a foreign public official. See § 2C1.7, Appl. N.1. In fact, the Sentencing Commission's failure to limit the definition suggest that it was intended to be broadly construed. Moreover, application in this context is eminently reasonable and appropriate to address the very harm represented by the defendant – a corrupt public official enriching himself at the expense of his populace. The defendant should not avoid full sanction for his conduct simply because he had the audacity and means to secret his assets and feather his nest outside the jurisdiction of his own country.

D. Total Offense Level

Based on the foregoing, the United States believes the total offense level is calculated as follows:

Multiple Count Adjustment (§ 3D1.4)	Level	Units
Adjusted Offense Level, Money Laundering Group	34	1
Adjusted Offense Level, Wire Fraud/ITSP Group	31	1
Total Number of Units		2
Highest Adjusted Offense Level	34	
Increase in Offense Level	2	
Combined Adjusted Offense Level	36	
Total Offense Level	36	

III. SENTENCING RECOMMENDATION

The United States recommends a sentence of 220 months in custody, forfeiture of $22,846,000, a fine of $43,392,000, a mandatory special assessment of $1,150, and a three year term of supervised release.

A. The § 3553(a) Factors Support the United States' Sentencing Recommendation

The defendant's conduct was breathtaking and egregious – not only did he abuse the trust of his constituents throughout the 1990s to amass $44,000,000 through extortion and fraud, he equally abused our financial system by (mis)using our banks to launder his criminal proceeds.

The defendant sought to use the United States, and its banking system, as a safe haven – a place to conceal his illicit wealth and escape from the crimes he committed in Ukraine, Switzerland and elsewhere. In that regard, the defendant represents a particularly dangerous type of criminal – wealthy, sophisticated and likely to import his criminality into the United States. The defendant's acquisition of his house in Marin is illustrative – the defendant used criminal proceeds that he transferred to the United States to purchase property here and, in an effort to conceal that fact and his direct involvement, he used a sham company locally to do it.

Worse still, the defendant is unrepentant and poised to wreak further havoc, absent a

significant sentence. In an interview last Fall for Ukrainian television, the defendant proclaimed his innocence. He advised the interviewer, and, by extension, the Ukrainian people essentially that it took him several years in our federal court system to clear his name. However, nothing could be further from the truth – he has been convicted of serious crimes and now stands before the Court asking for leniency in sentencing. Morever, after that interview, he filed a statement with the Ukrainian Election Commission to run for the national parliament in which he proclaimed that he had not been convicted of a willful felony. Thereafter, in March 2006, he managed to get himself elected to a regional parliament in Dnepropetrovsk. Given the defendant's track record, the United States is deeply concerned about the defendant's future conduct. The United States therefore urges the Court to impose a substantial sentence, which, as set forth below, is amply justified under § 3553(a).

For starters, consideration of "the nature and circumstances of the offense and the history and characteristics of the defendant" support the requested sentence. 18 U.S.C. § 3553(a)(1). The offense conduct demonstrates that from 1992 continuing past his dismissal as Prime Minister, the defendant focused on accumulating and concealing wealth through illegal means, at the expense of the people he was entrusted to serve. Most appalling is that during the time he controlled Dnepropetrovsk as its governor, and Ukraine was a fledgling democracy with limited resources and agricultural problems (hence the Nikipol wheat loan), the defendant took advantage to help himself, at the expense of others.[10] Frankly, the defendant's $14 million defrauding of Naukovy alone practically merits imposition of the requested sentence. Yet, his conduct was more egregious, dangerous, and deserving of greater punishment for a host of other reasons, including, his efforts to conceal his abuses, the funds generated by those abuses, the extended duration of his criminal activity, and its wholesale impact on and misuse of banking institutions in the United States and internationally.

For example, the defendant opened, with Kiritchenko's assistance, numerous coded bank

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[10] The defendant's voracious appetite for self-enrichment is also evident from his early extortion of Kiritchenko. There, the defendant leveraged his control of the Dnepropetrovsk region into a lucrative stake in Kiritchenko's business, including a trip to Poland to inspect Kirichenko's business records and bank account.

accounts, in Europe, the Carribean and the United States, and ensured that funds were transferred in ways that made them practically untraceable. He also made maximum efforts to ensure these accounts remained secret – he directed the statements to remain at the banks, he obtained a third-country travel document (from Panama) to decrease the chances his foreign travels would be scrutinized, and, as he rose up in prominence, he appointed Kiritchenko as an official adviser to guarantee necessary access to further his crimes. Additionally, he actively misled his entire constituency by filing false income declarations. Further, as internal investigations took hold, he vigorously attempted to prevent discovery of his millions – he cashed out of his Swiss bank accounts and relocated his wealth to the Carribean, which culminated with his acquisition of Eurofed.

Section 3553(a)(2) requires the Court to impose a sentence that, among other things, "reflect[s] the seriousness of the offense, promote[s] respect for the law, and . . .provide[s] just punishment for the offense." 18 U.S.C. § 3553(a)(2)(A). Here, the recommended sentence, which combines imprisonment, forfeiture and a fine, is designed to adequately punish the defendant – through custodial time and financial consequence – for his principal role in orchestrating a pattern of criminal activity arising from the defendant's abuse of his authority to enrich himself. The defendant's crimes were prolonged (the money laundering conspiracy covered the time from January 1992 to June, 1999); the consequences serious (the loss to the citizens of Ukraine of $44,000,000, the laundering of $21,696,000 through the U.S. financial system); and the danger of recidivism pronounced (given the defendant's claims of innocence and his recent election). Thus, it is imperative that the sentence both punish the defendant for his wrongdoing and deter future abuse. See 18 U.S.C. § 3553(a)(2)(A), (B) and ©.

In this case, the statutory objective of general deterrence is particularly important. See 18 U.S.C. § 3553(a)(2)(B) (sentence "to afford adequate deterrence to criminal conduct"); U.S. v. Zakhor, 58 F.3d 464, 467 (9th Cir. 1995) (general deterrence is a constitutionally permissible purpose of sentencing). In imposing sentence, the United States urges the Court send a message to other corrupt high-level officials from foreign countries that the United States is not a safe haven, and the abuse of its banking system will not be tolerated.

As discussed more fully below, the United States believes that its recommended sentence properly requires the defendant to forfeit his criminal proceeds and penalizes him, with a fine, that is appropriate in light of his substantial wealth.

B. Forfeiture

Criminal forfeiture is a sanction against the defendant, which is a mandatory part of sentencing. See, e.g., Libretti v. United States, 516 U.S. 29, 40 (1995); accord Casey, 444 F.3d 1071-1077; United States v. Nava, 404 F.3d 1119, 1124 (9th Cir. 2005); United States v. Monsanto, 491 U.S. 600, 606-607 (1989). "At sentencing, the district court must order forfeiture of the property in addition to imposing any other sentence." Nava, 404 F.3d at 1124. In money laundering cases, the Court may order forfeiture as a "personal money judgment" against the defendant in the amount of the laundered proceeds and/or as a forfeiture of specific property. 18 U.S.C. § 982(a)(1); Fed R. Crim. P. 32.2(b)(1); see United States v. Chavez, 323 F.3d 1216, 1218 (9th Cir. 2003). Here, the United States is seeking both, and thus requests that the Court order the forfeitures at sentencing.[11]

Specifically, the United States seeks forfeiture of $22,851,000, which represents the proceeds of the money laundering counts ($21,696,000), together with the increase in the value of 100 Obertz Lane, the property Lazarenko acquired as part of the money laundering conspiracy ($1,155,000).[12] The United States seeks a forfeiture in this amount as a money judgement. Additionally, the United States also seeks forfeiture of the following specific property directly involved in the defendant's money laundering:

- all funds and equity from Bank of America (BOA) account W71-224464, which included 923,000 shares of Ukranian bonds and $321,367.96 in cash and

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[11] Forfeiture must be included both in the oral announcement of defendant's sentence and in the judgement. Rule 32.2(b)(3) (providing that the order of forfeiture "shall be made part of the sentence and included in the judgment"); United States v. Bennett, 423 F.3d 271 (3d Cir. 2005).

[12] As established at trial, Lazarenko acquired 100 Obertz Lane through Dugsbury for $6,745,000 in 1998. On March 21, 2006, the property was appraised at $7,900,000. The United States is entitled to the increase in value and thus seeks it as part of the forfeiture order. See U.S. v. Real Property Located at 22 Santa Barbara Dr., 264 F.3d 860 (9th Cir. 2001) (property traceable to criminal proceeds is forfeitable in its entirety even if it has appreciated in value).

securities, as of December 16, 2004;[13]

- all funds and equity from BOA account W71-223433, which included $1,377,293.86 in cash, as of December 16, 2004;
- all funds seized from Bank Boston Robertson Stephens (BBRS) account 34-567156, which contained approximately $266,307.20[14]

To the extent the Court orders forfeiture of those specific properties, the United States will offset the amounts it seeks to recover through the money judgement.

C. Fine

The United States agrees with Probation that the Court should impose the maximum fine of $43,392,000 to satisfy the sentencing objectives of § 3553(a). Here, the chief of objective of the defendant's crimes was financial gain, and thus his sentence should disgorge him of those ill-gotten gains (which totaled $44 million), promote a respect for the law and deter the defendant from future crimes. A significant fine would serve those purposes. See 18 U.S.C. § 3553(a)(2)(A-C). According to the applicable sentencing guideline, "[t]he amount of the fine should always be sufficient to ensure that the fine, taken together with other sanctions imposed, is punitive." U.S.S.G., § 5E1.2(d).[15]

The defendant's wealth weighs heavily in favor of the maximum fine – for the fine to have the desired punitive effect, it must have an impact on the defendant. While the full extent of the defendant's wealth is unknown, it is undeniably substantial. As the evidence established

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[13] On August 2, 2006, the United States filed a supplemental forfeiture application related to an additional $273,678.30 from that account that was inadvertently omitted from the original application and forfeiture order related to that account. As described more fully in the supplemental application, these additional funds represent a reconciliation credit to that account and thus these funds are subject to forfeiture. Thus, the United States requests that the Court enter the supplemental preliminary order of forfeiture so that the defendant's interest may be forfeited and the United States can provide notice to any affected third parties.

[14] Note that the United States seized the contents of BOA accounts W71-224464 and W71-223433, both of which are in the name of Eurofed, pursuant to amended criminal seizure warrants on February 15, 2006. The BBRS account is specifically referenced in the Indictment (see ¶ 44(b)), and those funds were seized on February 7, 2000.

[15] Moreover, forfeited property cannot be used to offset any fine imposed by the Court. See, e.g., United States v. Trotter, 912 F.2d 964 (8th Cir. 1990).

at trial, the defendant collected hundreds of millions of dollars in his bank accounts. Moreover, to the extent the defendant claims all of his assets have been frozen as a result of the civil forfeiture action in the District of Columbia, he offers no proof. Def. Mem. at 22. In fact, the civil forfeiture complaint alleges that the defendant received $326 million in criminal proceeds between 1993-1997 and, according to the Department of Justice attorney pursuing that case, only approximately $255 million of those assets have been located and restrained. That leaves over $70 million unaccounted. The compound interest on that money alone over the last nine years would cover a substantial portion of any fine.

By comparison, the defendant was fined $6,552,363.13 as part of his Swiss sentence following conviction for two counts of money laundering. Here, the defendant was convicted of a wide array of criminal activity over an extended period of time, and thus a fine commensurate with his conduct is appropriate. Therefore, the United States urges the Court to impose the maximum fine of $43,392,000.

D. Restitution

Cooperating defendant Peter Kirtichenko has filed a victim impact statement which includes a claim for restitution of $17,363,309. While the United States does not endorse that claim, it does not object to his right to present it either. However, in light of Kiritchenko's dual role as a victim of the defendant's extortion and co-conspirator in his money laundering crimes, together with uncertainty regarding Kiritchenko's entitlement to restitution under the applicable statutes, the United States points out that to the extent the Court awards forfeiture, Kiritchenko would be able to petition the Attorney General (rather than the Court) for a remission of funds pursuant to 21 U.S.C. § 851(I).

IV. RESPONSE TO DEFENDANT'S OBJECTIONS

The United States responds briefly to the defendant's objections to the PSR. See Def. Mem. at 4-7.

With respect to ¶ 23 of the PSR, the defendant claims that the PSR improperly reflects the conclusion that the defendant received diverted funds as a result of the wheat deal. That is a fair reading of the jury's verdict and the proper inferences allowable from the evidence

presented. See Rule 29 Order, May 20, 2005, at 14 n.21 ("The Court also finds that the evidence of the 'wheat' deal fraud underlying Count 31 is sufficient to support the jury's verdict with respect thereto"). Thus, this objection has no merit.

With respect to ¶ 11 of the PSR, the defendant complains that the PSR improperly asserts that the defendant "exerted enormous influence over the economy and state institutions" and that he used that influence "to amass a personal fortune of more than $250,000,000." Def. Mem. at 5. With respect to the defendant's influence, there is no question that it was substantial and thus the objection on that basis is not well-founded. With respect to the defendant's abuse of authority, the United States recognizes that, based on the Court's rulings, it has only proven that $44,000,000, of his fortune can be tied to his criminal conduct, which is reflected in that paragraph of the PSR. Although the United States believes that the defendant did use his influence criminally to amass a much larger personal fortune, the United States understands (but disagrees with) the Court's rejection of its evidence in that regard. Thus, the PSR should not reflect otherwise.

With respect to ¶ 64 of the PSR, the defendant essentially seeks to provide context to his claim of innocence to Ukrainian TV and his declaration that he has not been convicted of a willful felony. These arguments are not so much objections to the PSR, but self-serving, after-the-fact excuses for the defendant's post-trial conduct.[16] Now, the defendant claims that his declaration of innocence only related to his relationships with the gas companies. However, he never made that distinction in the interview, and thus the Court should disregard it. The defendant's new explanation underscores his on-going refusal to accept any responsibility for his criminal activities and his efforts to manipulate what is known about them.[17]

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[16] The United States agrees with the defendant that ¶ 64 of the PSR is incorrect in the following respect – the defendant was elected to the regional parliament in March of this year, and it was the defendant's prior application for the national parliament that was rejected. Further, the rejected application is the one that contained the attestation that he has not been convicted of a willful felony.

[17] The United States will provide the Court with a copy of the draft English-language summary of the interview, which was previously provided to the defense and Probation, so the Court can evaluate the statement and its context, to the extent necessary.

Similarly, the defendant seeks to excuse his statement to the Ukrainian Central Election Commission that he has "not been convicted of a willful felony" with a technical defense from one of his Ukrainian lawyers, Ms. Dolgopola. Def. Mem. at 7. Ms. Dolgopla's declaration is defective in many regards, most notably because it fails to both establish her as an expert in Ukrainian electoral law and provide the applicable texts supporting her assertions. More fundamentally, it also highlights the on-going danger of the defendant's conduct. Specifically, Ms. Dolgopola provides a legalistic defense of the defendant's efforts to omit his criminal convictions and instead relies on the "common knowledge" about the defendant's convictions because they were "repeatedly aired by mass media over the last several years." See Dolgopola Decl., Ex. B to Def. Mem., ¶ 6. Yet, the defendant's own statements to that same mass media about his "innocence" are contradictory and thus cause for concern.

V. RESPONSE TO DEFENDANT'S DEPARTURE MOTIONS

A. The Defendant Is Not Entitled to a Downward Departure for Home Detention During Pretrial Release

The defendant urges the Court to depart downward to reflect the fact that the defendant has spent approximately 38 months under house arrest as part of his release conditions. Def. Mem. at 17-18. The Ninth Circuit has already rejected this argument in U.S. v. Daggao, 28 F.3d 985, 989 (9th Cir. 1994) (affirming lack of authority to "depart downward . . . on the basis of time spent under in-house detention").[18] In rejecting the downward departure based on pre-sentence home detention, the Daggao Court pointed out that "pretrial in house confinement does not serve as punishment," rather it serves to safeguard the community and ensure the defendant is present for trial and sentencing. Daggao, 28 F.3d at 989. To support his argument, the defendant cites to U.S. v. Miller, 991 F.2d 552, 554 (9th Cir. 1993). However, Miller was an entirely different factual and legal situation – there, the downward departure related to a term of home detention the defendant had already served as part of an erroneous sentence, not as part of pretrial release.

[18] In U.S. v. Sanchez, 161 F.3d 556, 564 (9th Cir. 1998), the Ninth Circuit overruled Daggao to the extent it "categorically forbid departure based on either time already served in state custody, or on the lost opportunity to serve more of one's state term concurrently with one's federal term," neither of which applies here.

Moreover, the Daggao Court distinguished Miller and carved out an exception, not applicable here, which permitted downward departures "under exceptional circumstances such as when a defendant is sentenced erroneously, and has served time under that erroneous sentence." Daggao, 28 F.3d at 989. Thus, the defendant's attempt to convert his release conditions into a basis for a departure fails. See also Reno v. Koray, 515 U.S. 50 (1995) (no credit for time spent at community center on release conditions).[19]

B. The Defendant Is Not Entitled to a Downward Departure Based on Circumstances in Ukraine

The defendant claims two other grounds as bases for a downward departure, both of which relate to the situation in Ukraine. First, the defendant claims because he faces charges in Ukraine, he deserves a downward departure. Def. Mem. at 18. This argument is unavailing for a number of reasons. First, the defendant fails to provide any legal authority to support this claim. Second, it makes no sense – that the Ukrainians may pursue their own charges related to their own investigation does not justify a lesser punishment here on the basis of the defendant's convictions. Further, the ultimate results of any Ukrainian prosecution are entirely speculative and thus an inappropriate basis for any departure. Next, the defendant claims a downward departure is warranted because he faces greater punishment here for money laundering than he would Ukraine. Again, the defendant fails to provide any authority to support this argument. As a practical matter, the lesser punishment there has no bearing on the distinct crimes he committed here. Thus, the Court should reject these grounds for relief.

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[19] The United States disagrees with the defendant's characterization of his time spent in various forms of custody since his entry without status into the United States in February of 1999. This may be important with respect to the defendant's sentence. First, the time the defendant initially spent in then INS custody (from February 16, 1999 until April 29, 1999, when he was arraigned on the Swiss extradition warrant and transferred to the custody of the U.S. Marshal, is not a basis for credit for any sentence imposed in this case. Similarly, the time the defendant spent in custody on the Swiss extradition warrant, from April 29, 1999, until his initial appearance on the Indictment in this case on June 13, 2000, is also not a ground for credit, particularly where the Swiss authorities credited him with that time as part of his sentence in that case. Thus, the defendant has only served approximately 36 months in this case – from June 13, 2000 to June 13, 2003.

VI. CONCLUSION

Based on the foregoing, the United States requests that the Court impose a sentence of 220 months in custody, forfeiture of $22,846,000, a fine of $43,392,000, a mandatory special assessment of $1,150, and a three-year term of supervised release.

DATED: August 11, 2006

Respectfully submitted,

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TABLE OF AUTHORITIES

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